



Agenda Date: 11/13/03
Agenda Item: 3A

STATE OF NEW JERSEY

Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.bpu.state.nj.us

OFFICE OF CABLE
TELEVISION

IN THE MATTER OF THE PETITION OF COMCAST)	ORDER ON MOTION
CABLEVISION OF SOUTH JERSEY, INC. FOR A)	FOR CLARIFICATION
RENEWAL CERTIFICATE OF APPROVAL TO)	
CONTINUE TO CONSTRUCT, OPERATE AND)	
MAINTAIN A CABLE TELEVISION SYSTEM IN THE)	
CITY OF ATLANTIC CITY, COUNTY OF ATLANTIC,)	
STATE OF NEW JERSEY)	

BPU Docket No. CE01050325
OAL Docket No. CTV08055-02S

SERVICE LIST ATTACHED

BY THE BOARD¹:

The New Jersey Board of Public Utilities (Board) and its Office of Cable Television (OCTV), pursuant to N.J.S.A. 48:5A-1 et seq., have been granted general supervision and regulation of, and jurisdiction and control over, all cable television systems which operate within the State of New Jersey, subject only to the limitations of federal law. Pursuant to this authority, the within matter was opened to the Board upon the filing of a formal petition by the City of Atlantic City (Atlantic City or the City) seeking clarification and reconsideration of the Order entered by the Board on September 11, 2003, modifying on interlocutory review the Initial Decision rendered by Administrative Law Judge (ALJ) Edgar R. Holmes setting the scope and limitations of discovery in the ongoing action.

In the Order the City now seeks to have clarified, this Board found that the scope of the proceeding before the OAL should be limited to that information available to the City prior to the May 21, 2001 filing of a petition for a Certificate of Approval without municipal consent by Comcast Cablevision of South Jersey, Inc. (Comcast), and any additional discovery should be limited to those issues before the City at that time. Thus, discovery on issues concerning the alleged technical failures and the financial health and profitability of Comcast were beyond the

¹ Commissioner Alter did not participate in the deliberations or vote on this matter.

scope of discovery available to the City, but the issues raised by the ascertainment report and the public hearing were appropriately before the ALJ. The Board found this to be reasonable and rational based upon the procedural history of this matter and the appropriate federal, State and Board requirements.²

Atlantic City contends that the Board's Order is ambiguous in that the limitation of discovery over technical and financial issues is a violation of State and federal law such that the language used must be incorrect. Atlantic City further notes that the limitations in discovery will make it impossible for the Board and the ALJ to determine the technical and financial situation of the cable operator, as required under N.J.A.C. 14:18-13.7. Finally, while not pointing to any new or additional legal or factual circumstances, Atlantic City bases its argument primarily upon its belief that the Board misapplied the appropriate legal standards.

Comcast, in its objection papers, notes its belief that this is a motion for reconsideration, not clarification, and should be adjudicated as such. Comcast states that the City fails to identify any particular error of fact or law, and that the Board's Order is consistent with federal and State law such that the Order should not be disturbed. Ultimately, according to Comcast, this motion is without merit.

While couched in terms of a motion for clarification, Atlantic City is actually seeking reconsideration, in that its request is for the Board to "clarify so much of its interlocutory order entered September 11, 2003 . . . as might be read to restrict the financial and technical issues before Administrative Law Judge Holmes." (City of Atlantic City's Brief in Support of Motion for Clarification of the Board's Order Modifying Initial Determination Upon Cablevision of South Jersey's Motion for Interlocutory Review, at ¶ 1). In light of the language by the Board designed to limit discovery in this matter to only those issues raised prior to the May 21, 2001 filing, and excluding other issues of a technical and financial nature, this request, by its nature, requires more than just clarification on the part of the Board, and thus is subject to the requirements and standards of a motion for reconsideration.

In light of the nature of the motion, and in the absence of the presentation of any new or additional facts or law, Atlantic City's request fails to satisfy the requirements for reconsideration. The standards for reconsideration are substantially harder to meet than are those for a reversal of a judgment on appeal. I/M/O Alleged Non-compliance by RCN of NY, a Wholly-owned Subsidiary of RCN Corporation, with the Requirements of N.J.S.A. 48:5A-15, 16, 17 and 22 Requiring Municipal Consent from the City of Jersey City and a Certificate of Approval from the Board for Newport Community in Jersey City, New Jersey, BPU Docket No. CC03010023, Order Denying Motion for Reconsideration (June 20, 2003); Dantzler v. Director, 18 N.J. Tax 507, 508 (1999). A party should not seek reconsideration merely based upon dissatisfaction with a decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. E.g., Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. At 401. "Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement." Ibid.

² This procedural history is set forth in more detail in the Board's September 11, 2003 Order in this matter.

Atlantic City fails to raise any indication that the Board's decision was based upon a "palpably incorrect or irrational basis" or that the Board failed to consider or appreciate significant evidence. The decision of the Board is not arbitrary, capricious or unreasonable. Instead, Atlantic City raises issues that had been raised previously before the Board and upon which the Board made reasonable and rational determinations. In essence, Atlantic City is unhappy with the determination made by the Board; this unhappiness, however, is not an appropriate basis for a motion for reconsideration. In the absence of a significant showing by Atlantic City that the Board acted in an obviously incorrect or inappropriate manner, reconsideration should be denied.

Nevertheless, to the extent that the Board's previous Order can be read to indicate that the ALJ has no jurisdiction over technical and financial issues, the Order is HEREBY CLARIFIED to indicate that, while Atlantic City may not seek discovery on questions of technical sufficiency or any financial issues associated with the operation of Comcast, or any issues not explicitly raised prior to May 21, 2001, the ALJ is not foreclosed from engaging in the review of any element required under N.J.A.C. 14:18-13.7. In all other aspects, the Board HEREBY DENIES the petition of Atlantic City seeking clarification of the Order entered by the Board on September 11, 2003, and HEREBY ORDERS that the Order shall not be modified.

DATED: November 17, 2003

BOARD OF PUBLIC UTILITIES
BY:

(signed)

JEANNE M. FOX
PRESIDENT

(signed)

FREDERICK F. BUTLER
COMMISSIONER

(signed)

CAROL J. MURPHY
COMMISSIONER

(signed)

CONNIE O. HUGHES
COMMISSIONER

ATTEST:

(signed)

KRISTI IZZO
SECRETARY

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